STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK JEROME POWELL,

Defendant-Appellant.

UNPUBLISHED
October 22, 1999

No. 208423
Kent Circuit Court
LC No. 97-004059 FH

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty to thirty years' imprisonment, consecutive to the completion of his previous sentence for manslaughter from which he was on parole at the time of the instant offense. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that the trial court abused its discretion in admitting evidence of defendant's 1992 conviction of voluntary manslaughter in a shaken baby death case. Defendant claims such evidence was more prejudicial than probative, stating that the prosecutor used this evidence to prove conduct in violation of MRE 404(b). We review the admission of bad acts evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Generally, character evidence is not admissible to prove conduct. MRE 404(a). However, evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as to prove intent, knowledge, identity, or absence of accident. MRE 404(b)(1). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), the Michigan Supreme Court clarified the standard for admission of prior bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

If the only theory of relevance of other acts evidence is that it shows the defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, it is not admissible. *Id.* at 63. In *VanderVliet, supra* at 65, our Supreme Court summarized:

> There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.

According to the Michigan Supreme Court, "Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *Id.* (emphasis in original).

Defendant presents several arguments as to why the trial court erred, none of which are availing. Defendant claims that the prosecutor had no eyewitnesses and no physical, scientific, or medical evidence incriminating defendant, and therefore lacked sufficient evidence to convict but for the fact of defendant's prior conviction in a similar case, which the prosecutor used to plant the seed of criminal propensity in the minds of the jurors. Defendant contends that *VanderVliet* indicates that the prosecutor's showing of defendant's criminal propensity should make evidence of his prior conviction inadmissible. As discussed below, sufficient evidence existed to convict defendant. Moreover, *VanderVliet, supra*, specifically states that other acts evidence does not violate Rule 404(b) unless offered *solely* to show defendant's criminal propensity to establish that defendant acted in conformity therewith. The record reflects that defendant's prior conviction was offered to show defendant's intent, knowledge, and lack of mistake or accident, as well as to indicate the poor likelihood of coincidence here, which are proper purposes under *VanderVliet*. Therefore, defendant's argument is without merit.

Defendant's argument regarding the conviction not being a fact of consequence to the trial is inaccurate and unpersuasive because the proper standard is that it be "relevant . . . to an issue or fact of consequence at trial," *VanderVliet*, *supra* at 74, which it is for the reasons discussed above. Finally, defendant argues that the evidence of his prior conviction is unfairly prejudicial based on the lack of other significant probative evidence presented by the prosecutor and the extreme similarity between the previous and the current cases. Where the evidence was presented for proper purposes, not to show defendant's bad character, and where the trial court weighed the probative versus prejudicial value and determined that the risk of prejudice was not unfair, we conclude that the trial court did not abuse its discretion when it allowed evidence of defendant's prior conviction.

Next, defendant argues that the trial court abused its discretion in admitting the photograph of the victim on a ventilator because its value was more prejudicial than probative and it incited both

passion and prejudice in the jury. We review for an abuse of discretion the admission of photographs. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). In *People v Mills*, 450 Mich 61; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995), when addressing the steps necessary to determine the admissibility of photographs, our Supreme Court concluded that the first inquiry is whether the evidence is relevant under MRE 401, which requires that the evidence have any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* at 66-67; MRE 401. If the evidence is relevant under MRE 401, it must be determined whether the evidence should be excluded under MRE 403, which addresses whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Mills, supra* at 66.

Defendant argues that admission of the photograph was an attempt to sway the jurors and gain sympathy for the victim where defendant did not contest that the injuries to the child were significant; however, the prosecutor responds that the photograph, which shows the child's entire body, was not gruesome and was necessary to give a frame of reference for the other photographs, which were close-ups of the bruises on the victim's head and abdomen. At trial, the court noted that the prosecutor is not bound by a defendant's decision not to pursue a particular point related to elements of the offense. *Mills, supra* at 69-70. The trial court determined that the photograph was admissible because it was pertinent to the seriousness of the offense, thereby satisfying MRE 401, and because the photograph, which is neither shocking nor gruesome, demonstrates the seriousness of the injury that was potentially very relevant to the identity of the person who caused the injuries, it did not offend MRE 403. Based on this record, we conclude that the trial court did not abuse its discretion when it admitted the photograph.

Defendant also contends, citing *People v Rogers*, 14 Mich App 207, 214-215; 165 NW2d 337 (1968), that he was denied due process and a fair and impartial trial because the prosecutor never established what light was shed by the photograph upon any material point of issue in this case. Defendant's claim is without merit because it was established at trial that the photograph served to show the extent and seriousness of the victim's injuries, which was pertinent to a material point in issue—the child abuser's identity. Further, the prosecutor must prove every element of a crime beyond a reasonable doubt, *Mills, supra*, and one of the elements of the charged crime, first-degree child abuse, is serious physical harm. MCL 750.136b(2); MSA 28.331(2)(2).

Defendant next claims that the photograph was cumulative because the prosecutor planned on calling as witnesses the victim's mother, treating doctors and nurses, and the investigating officers. We disagree. The photograph provided a visual of the doctor's testimony about the injuries and the resulting care, and photographs are not excludable merely because a witness can testify about what they depict. *Mills, supra* at 76.

Defendant also claims that the nature of the photograph was such that the prejudice to defendant outweighed any possible probative value and had no relevance because it depicted nothing bearing on the cause of the victim's injuries. Defendant suggests that as a result of these alleged errors, the admitted photograph incited passion and prejudice in the jury. Even though the photograph did not depict the cause of the injuries, it did help demonstrate the extent or seriousness of the injuries. *People*

v Flowers, 222 Mich App 732, 736; 565 NW2d 12 (1997). A photograph otherwise admissible for a proper purpose is not rendered inadmissible because of the shocking nature of the crime or the photograph's gruesome details. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). The court determined that the photograph was probative of the child abuser's identity where tremendous force was needed to inflict such wounds, and it allowed admission of the photograph. Based on this record, we conclude that the trial court did not abuse its discretion in admitting the photograph.

Next, defendant argues that the prosecutor did not present sufficient evidence to convict him of first-degree child abuse. Specifically, defendant contends that the trier of fact had to indulge in several unsubstantiated inferences to support defendant's conviction because the prosecutor failed to present either eyewitness testimony or physical, scientific, or medical evidence indicative of guilt. When reviewing questions based on the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Pursuant to MCL 750.136b(2); MSA 28.331(2)(2), "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, the prosecutor presented evidence at trial that supports the requisite elements of the crime charged. The victim's mother testified that she left her son at home with defendant when she was working on the day the abuse may have occurred; that defendant told her that the child had fallen, hitting his head on a coffee table, and she saw a small bruise on his head and a pink mark on his hairline; and that the victim was sleeping most of the next day, refusing food, vomiting, and ultimately seizing during which his breathing stopped temporarily. She further testified that defendant did not tell her about his probation restrictions, and although his parole officer had told her that defendant was not to have contact with children, she did not know the real reason for the restriction, i.e., that defendant had pleaded guilty previously in 1992 of voluntary manslaughter in a shaken baby death case. Additional evidence was presented that the upstairs neighbor heard loud noises downstairs on the night that defendant was alone with the victim, including a child crying and screaming, defendant's voice yelling at the child, and a stomping noise that lasted approximately five minutes. The landlord testified that he had stopped by defendant's apartment earlier that night and found defendant to be irritated and upset because the baby-sitting plans for the victim had been mixed-up. Further, medical testimony revealed that the victim's pediatrician never saw any signs of abuse before the incident; that since the incident there have been no other indications of abuse; that it takes terrific force to cause the head injuries the victim sustained; and that the injuries were not accidental, but were the result of the victim being shaken. Viewing this evidence in a light most favorable to the prosecutor, we find it was sufficient for a rational trier of fact to determine that defendant inflicted the victim's injuries.

Finally, defendant argues that his sentence is disproportionate based on the mitigating factors present. We review the trial court's imposition of a particular sentence for an abuse of discretion, "which will be found where the sentence imposed does not reasonably reflect the seriousness of the

circumstances surrounding the offense and the offender." *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Our review of habitual offender sentences is limited to determining whether the imposed sentence violates the principle of proportionality, without reference to sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Here, the sentencing guidelines are inapplicable because defendant was convicted and sentenced as a third felony offender. The trial court based its sentence on defendant's criminal record of causing the death of another child in the same manner as causing the injuries to the victim herein and its belief that defendant's imprisonment was necessary for the protection of society. We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, and the trial court did not abuse its discretion in sentencing defendant. *Milbourn, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter